SERVED: July 18, 2002

NTSB Order No. EA-4985

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of July, 2002

In the Matter of	
SEAN D. WAMPOLE,	Docket NA-40
Appellant.	

ORDER

The respondent has appealed from the written order Administrative Law Judge William E. Fowler, Jr., served in this matter on December 14, 2001.[1] By that order, the law judge rejected as untimely an appeal the respondent sought to take from certificate action the Administrator had initiated to revoke his airline transport pilot certificate. For the reasons discussed below, we have decided to postpone decision on the appeal to us from that ruling pending a remand to the law judge for findings

[1]A copy of the law judge's order is attached.

on a factual conflict that cannot be resolved on the record as currently constituted.

On October 3, 2001, respondent, while visiting the Orlando Flight Standards District Office on business unrelated to this case, surrendered his ATP certificate to an FAA inspector after being advised that the Administrator had revoked it in an emergency order issued on March 16, 2001.[2] On November 6, 2001, the respondent sent correspondence to the Board that was construed to reflect his desire to appeal the Administrator's March order.[3] The Administrator moved to dismiss the appeal as untimely. In the order on appeal here, the law judge determined that because the March 16 revocation order appeared not to have been sent to the most up-to-date address respondent had provided to the Administrator, respondent had good cause for not appealing from it by March 26.[4] The law judge nevertheless agreed with the Administrator that the November 6 appeal was late, since, even if the service date of the revocation order was deemed to be October 3, respondent's appeal was filed beyond the time limits

[2]The revocation order is predicated on allegations that respondent had altered the date on his first-class medical certificate and had then operated flights for which he lacked proper medical certification.

[3]The Administrator was not served a copy of this correspondence. The Board provided a copy to counsel for the Administrator on November 7.

[4]The law judge assumed, without deciding, that respondent had provided, as he claimed, proper notification of this change of address, which was different from two other addresses respondent had used on medical applications within the prior year.

applicable to either an emergency (10 days) or a non-emergency appeal (20 days) under the Board's rules of practice.[5]

Respondent's appeal brief makes no effort to show that the law judge erred in his determination not to accept respondent's late appeal. Rather, much like the letter we treated as his notice of appeal and the correspondence responding to the Administrator's motion to dismiss, the brief speaks predominantly to the merits of the Administrator's charges. Such argumentation is premature at this juncture, for the only issue presently before the Board is whether the law judge erred in determining that the appeal should not be entertained, not who would prevail if the matter were accepted and proceeded to an evidentiary hearing. The respondent's brief also contains extensive new and explanatory information, not presented to the law judge, bearing both on the timeliness of the respondent's notice of appeal and on the question of whether he had good cause for not filing it sooner than he did.[6] The Administrator has moved to strike this

[5]The law judge was not persuaded that respondent's pro se status or claim that he has a sick mother established good cause for not complying with the filing deadline. Respondent retained counsel after the law judge decided not to accept his appeal.

[6]For example, counsel for respondent contends that respondent's appeal to the Board should not be considered late because he had sent a letter to the Administrator on October 3 professing his innocence of the alteration allegation and asking that the charges be dropped. This letter, we are told, never actually reached the Administrator but was returned a month later. We are also told that while respondent does not have the returned letter, or a copy of it, he has the UPS Next Day envelope it was sent and returned in. Aside from the fact that respondent made no mention of such a letter, or the return of one, in his prior submissions to the law judge, even if he did send such a letter to the Administrator, it would not qualify as

material. Because we agree that the boundary for our review of the validity of a law judge's decision is the content of the record on which it was based, we grant the Administrator's motion. Absent specific authorization, and without regard to whether a hearing has been held, it is improper in an appeal to the Board to refer to or base arguments on matters that were not first presented to the law judge.[7]

Although we do not take issue with the law judge's assessment that respondent did not show good cause for failing to file within 10 days after October 3 an appeal from the March 16, 2001 revocation order, we are not entirely satisfied that the record demonstrates a sound basis for the law judge's underlying assumption that respondent received a copy of the March 16 order on October 3.[8] On the one hand, respondent's November 6 and November 19 letters to the Board claim that he was never given the March 16 order *or* advice on how to challenge the

(..continued)
an appeal to the Board.

[7]This is an elementary legal precept of which professional counsel should be well aware. It is not rendered inapplicable here because counsel did not enter a case until after the time for submitting supporting documentation to the law judge had passed. The time for seeking consideration of information not reasonably discoverable before the law judge's ruling is after the Board has decided an appeal from his decision, not before. See 49 C.F.R. 821.50.

[8]Even if we were to consider the information attached to respondent's appeal brief concerning his asserted involvement in the Fall of 2001 in caring for his mother and helping her to attend medical appointments several times per week, it would not support a conclusion that he had not had available to him ample time to accomplish the simple act of advising the Board, in a one-sentence letter, that he wanted to appeal from the revocation order.

Administrator's charges. On the other hand, we have the written statement of the FAA inspector who related that, on October 3, he read the order to the respondent from beginning to end and gave him a copy of it. It is possible, we suppose, that both individuals are telling the truth or that one or the other of them is simply mistaken in his recollection of what appears to have been a stressful event.[9] Nevertheless, without evidence corroborative of either party's assertions, we have no effective basis for determining whose written accounts should be given more weight with respect to this critical factor.[10]

In view of the foregoing, we have determined that the matter should be returned to the law judge to conduct a hearing for the limited purpose of resolving the parties' conflicting statements as to whether service of a copy of the Administrator's order was accomplished on October 3, 2001.[11] Following receipt of a

[9]It is possible, for example, that respondent's denial of receiving a copy of the order was intended to refer back to its original service in March 2001. At the same time, unless respondent received, but did not read, a copy of the March order assertedly given to him on October 3, it seems unlikely that he would later complain, before a copy of the inspector's statement had been sent to him with the motion to dismiss, that he was not told how to contest the order, as appeal rights are routinely included in orders of the Administrator that affect certificate rights.

[10]The Administrator's authority to take certificate action is, of course, tied to the proper delivery of an order describing why such action is necessary.

[11]We are also interested in record development concerning the comment in the inspector's statement that respondent confirmed on October 3 that one of the two addresses on which the revocation order was served in March was still valid. The law judge should allow testimony by the inspector and the respondent on this service-related issue.

hearing transcript setting forth the law judge's relevant credibility and any other findings and conclusions, the Board will promptly issue a final order on respondent's pending appeal.

ACCORDINGLY, IT IS ORDERED THAT:

The case is remanded to the law judge for action consistent with this order.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order.